

# INTERNATIONAL LAW ASSOCIATION

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### COMMITTEE ON INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE

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### FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENCES

#### Introduction

In 1994, the 66th ILA Conference in Buenos Aires identified 'the implementation of the principle of universal jurisdiction in connection with gross human rights violations' as an appropriate topic for study by the Committee on Human Rights Law and Practice. The Committee appointed Prof. Menno Kamminga to act as its rapporteur on the subject. At the 67th ILA Conference in Helsinki he presented to the Committee the approach he intended to take.<sup>1</sup> The 68th ILA Conference in Taipei considered the First Report of the Committee.<sup>2</sup> The Conference requested the Committee to present a final report at its 69th session

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<sup>1</sup> *Report of the Sixty-Seventh ILA Conference* 364-365.

<sup>2</sup> *The Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences: First Report, Report of the Sixty-Eighth ILA Conference* 563-576.

to be held in London in 2000.<sup>3</sup> The present report contains the Committee's conclusions and recommendations which it recommends for adoption by the London Conference.

The report has been thoroughly discussed at a special meeting of the Committee held at the Rockefeller Foundation's Study and Conference Center in Bellagio, Italy from 25-29 October 1999. The meeting was attended by the following members of the Committee: Prof. Anne Bayefsky, Assoc. Prof. Andrew Byrnes, Prof. Yuji Iwasawa, Justice Vijender Jain, Prof. Menno Kamminga, Mr. Jeremy McBride and Prof. Martin Scheinin. The meeting benefited from the presence of several invited guests with specific expertise on the exercise of universal jurisdiction in respect of gross human rights offences: Detective Superintendent Geoff Hunt, Metropolitan Police, London, United Kingdom; Mr. Richard van Elst, legal assistant, Supreme Court, The Hague, The Netherlands; Ms Fiona McKay, legal officer, Redress Trust, London, United Kingdom; Major Claude Nicati, war crimes prosecutor, Neuchâtel, Switzerland; Mr. Luc Reydam, University of Notre Dame, United States; and Ms Marleen de Roos-Schoenmakers, war crimes prosecutor, Arnhem, The Netherlands. The following members of the Committee were unable to attend the Bellagio meeting but submitted written comments: Mr. Alan Baker, Prof. John Dugard, Mr. Raymond Favreau, Prof. Thomas Franck, Prof. Eckart Klein, Prof. Robert McCorquodale, Prof. Sir Nigel Rodley, and Mr. Charles Siegal.

The Committee is very grateful to the Rockefeller Foundation for having made available its conference facilities at Bellagio and to the Vereniging Trustfonds Erasmus Universiteit Rotterdam for having funded the travel expenses of some of the invited guests. The Committee expresses its appreciation and gratitude to its co-rapporteur responsible for the study, Prof. Kamminga, both because of his essential role in drafting the Committee's report and because of his initiative to hold a retreat meeting in Bellagio.

### **What is universal jurisdiction?**

Under the principle of universal jurisdiction a state is entitled or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim.<sup>4</sup> The only connection between the crime and the prosecuting state that may be required is the physical presence of the alleged offender within the jurisdiction of that state.<sup>5</sup> This report is concerned with jurisdiction to adjudicate, specifically the exercise of criminal jurisdiction by domestic courts in respect of gross human rights offences. It does not cover enforcement juris-

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<sup>3</sup> Ibid. 27.

<sup>4</sup> See Kenneth C. Randall, 'Universal Jurisdiction under International Law', 66 *Texas Law Review* (1988) 785, 788.

<sup>5</sup> In Australia, the Federal Republic of Germany and the United Kingdom, universal jurisdiction with respect to certain crimes may only be invoked against foreign nationals when they happen to be (long term) residents. See Appendix.

diction or the exercise of jurisdiction for the purpose of obtaining civil law remedies.<sup>6</sup> The term ‘gross human rights offences’ is employed as shorthand for certain serious violations of international humanitarian law and international human rights law that qualify as crimes under international law and that are of such gravity as to set them out as deserving special attention, *inter alia*, through their being subjected to universal jurisdiction.

### **Rationale for the exercise of universal jurisdiction**

The term ‘universal jurisdiction’ appears to have been coined by Cowles in 1945. On the basis of a detailed analysis of state practice in response to ‘brigandism’ (banditism), he concluded that every state had jurisdiction to punish war crimes regardless of the nationality of the victim, the time it entered into war or the place where the offense was committed. This was because war crimes, like piracy and brigandism, were to be regarded as offences against the conscience of the civilized world and every nation therefore had an interest in their punishment.<sup>7</sup>

This justification is still valid. By qualifying certain crimes as being subject to universal jurisdiction the international community signals that they are so appalling that they represent a threat to the international legal order. Justice requires that there should be no safe haven for the perpetrators of such crimes. Domestic courts and prosecutors bringing the perpetrators to justice are not acting on behalf of their own domestic legal system but on behalf of the international legal order. The increasing exercise of universal jurisdiction in respect of gross human rights offenders is a reflection of the smaller world in which we live in which people feel affronted not merely by crimes committed within their own territories or against their own fellow citizens but also by heinous crimes perpetrated in distant states against others. They therefore regard it as appropriate that the machinery of justice in their state is used to bring the perpetrators to trial.

A different argument sometimes put forward as a justification for the exercise of universal jurisdiction is its supposed deterrent effect. However, as always in the field of criminal law, this effect should not be overstated. During the Second World War German atrocities continued to be committed unabated after the Allies had announced their intention to pursue the perpetrators ‘to the uttermost ends of the earth’ and to deliver them to their accusers.<sup>8</sup> More recently, serious crimes on a massive scale continued to be committed in Kosovo after the Chief Prosecutor of the Yugoslavia Tribunal (ICTY) had announced her

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<sup>6</sup> In the United States universal jurisdiction has been exercised with some success for the purpose of obtaining civil law remedies under the Alien Tort Claims Act and the Torture Victim Protection Act. For an overview see Beth Stephens, ‘Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts’, 40 *GYIL* (1997) 117-140.

<sup>7</sup> Willard B. Cowles, ‘Universal Jurisdiction over War Crimes’, 33 *California Law Review* (1945) 177-218.

<sup>8</sup> Declaration of German Atrocities, 1 November 1943, 9 *Department of State Bulletin* (1943) 310, 311.

intention of investigating and prosecuting these crimes in a letter addressed to President Milosevic and other senior officers.<sup>9</sup>

The key rationale for the exercise of universal jurisdiction, therefore, is not deterrence but justice. An interesting spin-off, however, may be its positive impact on the willingness of the territorial state to bring proceedings against gross human offenders. It is not unlikely that the authorities there may be shamed into action by the exercise of universal jurisdiction in another state, as is illustrated by the apparently positive impact of the arrest of General Pinochet in the United Kingdom on prosecutorial activity in Chile.

The scope of this report is limited to the exercise of universal jurisdiction in respect of gross human rights offences. It does not cover the exercise of universal jurisdiction with regard to various kinds of terrorist offences. This is because the implementation of the principle of universal jurisdiction in these latter cases presents fewer difficulties. Unlike gross human rights offenders, pirates and aircraft hijackers present a material risk to citizens of all nations and states therefore need less encouragement to take legal action against them on the basis of universal jurisdiction.

### **Human rights offences subject to universal jurisdiction**

The work of the International Law Commission offers a convenient starting point for the identification of the crimes that are subject to universal jurisdiction under international law. In its 1996 Draft Code of Crimes against the Peace and Security of Mankind, the ILC suggested that genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes are subject to universal jurisdiction.<sup>10</sup> According to the Draft Code a state party in the territory of which an individual is found who is alleged to have committed one of these crimes shall extradite or prosecute that individual.<sup>11</sup> The Draft Code does not define genocide, crimes against humanity and war crimes. These concepts have recently been authoritatively defined, however, in Articles 6-8 respectively of the Statute of the International Criminal Court (ICC). Strictly speaking the purpose of these latter provisions is merely to designate the crimes that are within the jurisdiction of the ICC. A reasonable assumption however, is that the offences listed here will 'take on a life of their own as an authoritative and largely customary statement of international humanitarian and criminal law, and may thus become a model for national laws to be enforced under the principle of universality of jurisdiction.'<sup>12</sup> In addition to these crimes, torture not

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<sup>9</sup> Letter from Justice Louise Arbour to President Milosevic and other senior officials, ICTY press release JL/PIU/389, 26 March 1999.

<sup>10</sup> Articles 8, 9, 17, 18, 18 and 20 of the Draft Code of Crimes Against the Peace and Security of Mankind. Report of the International Law Commission on the Work of its Forty-Eighth Session, UN Doc. A/51/10, para. 50.

<sup>11</sup> *Ibid.*, Art. 9.

<sup>12</sup> Theodor Meron, 'Crimes under the Jurisdiction of the International Criminal Court', in Herman A.M. von Hebel, Johan G. Lammers and Jolien Schukking (eds), *Reflections on the International Criminal Court* (1999) 47, 48.

amounting to a crime against humanity is a crime subject to universal jurisdiction pursuant to the UN Convention against Torture. Following is a brief discussion of these four categories of offences.

### *Genocide*

Article 6 of the 1948 Genocide Convention provides that perpetrators of genocide must be tried by the territorial state or by an international criminal tribunal:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

The convention does not specifically provide for the exercise of universal jurisdiction by domestic courts. However, it is widely agreed that the offence of genocide is subject to universal jurisdiction as a principle of customary international law.<sup>13</sup> State practice regarding the exercise of universal jurisdiction in respect of genocide supports this view. German courts have in recent years convicted two Bosnian Serbs of genocide committed against Muslims in Bosnia.<sup>14</sup> No state has objected to this exercise of universal jurisdiction in respect of the crime of genocide. A Swiss court recently refused to exercise jurisdiction on the basis of the universality principle in respect of the crime of genocide but this was merely because the necessary enabling legislation was lacking.<sup>15</sup>

### *Crimes against humanity*

The concept of crimes against humanity has long lacked an authoritative definition. However, this gap has now been filled by the Statute of the ICC. Article 7 defines as crimes against humanity a number of practices, including murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, enforced disappearance and apartheid 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.' No connection with an armed conflict is required.

The Statute understandably does not purport to enable domestic courts to exercise universal jurisdiction in respect of these crimes. However, it is widely considered that such exercise of jurisdiction is permitted under customary international law.<sup>16</sup> An investigating magistrate in Brussels has recently ruled that

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<sup>13</sup> *Restatement (Third) of the Foreign Relations Law of the United States* (1987), para. 404, Reporters' Note 1.

<sup>14</sup> See Appendix.

<sup>15</sup> See Appendix.

<sup>16</sup> Nigel S. Rodley, *The Treatment of Prisoners under International Law* (2nd ed. 1999) 125. M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd ed. 1999) 240.

alleged perpetrators of crimes against humanity committed abroad could be brought to justice in Belgium on the basis of customary international law.<sup>17</sup> Belgium has subsequently amended its legislation to specifically enable its courts to exercise universal jurisdiction in respect of crimes against humanity.<sup>18</sup> These assumptions of jurisdiction did not prompt an international outcry.

### *War crimes*

War crimes may be divided into two categories.

The first category consists of grave breaches of the four Geneva Conventions of 1949, i.e. offences committed during international armed conflict. Offences qualified as grave breaches in these instruments include wilful killing, torture or inhumane treatment, and wilfully causing great suffering.<sup>19</sup> Parties to the Geneva Conventions are required to enact legislation to enable them to try persons alleged to have committed such offences, regardless of their nationality, to search for and prosecute such offenders and to assist each other in criminal proceedings in connection with these offences. The exercise of universal jurisdiction is not permissive but clearly mandatory:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.<sup>20</sup>

The second category of war crimes consists of serious violations of Common Article 3 of the Geneva Conventions and other serious violations of the laws and customs applicable in armed conflicts not of an international character. These violations have traditionally not been considered as criminal offences that are subject to universal jurisdiction.<sup>21</sup> However, there is increasing support for the view that this position is no longer tenable.<sup>22</sup> The atrocities committed during the armed conflicts in the former Yugoslavia and Rwanda have obvious-

<sup>17</sup> Juge d'instruction à Bruxelles, ordonnance, 6 november 1998, *Revue de Droit Pénal et de Criminologie* 1999, 278, 288.

<sup>18</sup> See Appendix.

<sup>19</sup> Articles 50, 51, 130 and 147 of the First, Second, Third and Fourth Geneva Convention, respectively.

<sup>20</sup> Articles 49, 50, 129 and 146 of the First, Second, Third and Fourth Geneva Convention, respectively.

<sup>21</sup> Denise Plattner, 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflict', 30 *International Review of the Red Cross* (1990) 409, 414.

<sup>22</sup> See the thorough analysis in Thomas Graditzky, 'Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts', *International Review of the Red Cross* No. 322 (1998) 29-56. See also, Theodor Meron, 'International Criminalization of Internal Atrocities', 89 *AJIL* (1995) 554.

ly contributed to this shift. The Rwanda Tribunal (ICTR) was specifically empowered by the Security Council to try perpetrators of serious violations of common Article 3 and Protocol II.<sup>23</sup> While the ICTY was not granted this specific competence, in the *Tadic* case the Tribunal decided that customary international law imposes criminal liability for serious violations of common Article 3 and that it had jurisdiction with regard to such violations.<sup>24</sup> The Statute of the ICC carefully identifies the serious violations applicable in internal armed conflicts with regard to which the Court has jurisdiction.<sup>25</sup> It is difficult to see why domestic courts would not have the competence to try these same offences on the basis of universal jurisdiction. This conclusion finds support in a recent resolution on the situation of human rights in Sierra Leone, adopted without a vote by the UN Commission on Human Rights. The resolution obviously assumes that the universal jurisdiction regime applies equally to crimes committed in international and internal armed conflict, even to the extent that states are not merely entitled but even required to search for perpetrators of grave breaches perpetrated in internal armed conflict. Remarkably, the resolution employs the term 'grave breaches' for certain crimes perpetrated in both international and internal armed conflict. The Commission:

Reminds all factions and forces in Sierra Leone that in any armed conflict, *including an armed conflict not of an international character*, the taking of hostages, wilful killing and torture or inhuman treatment of persons not taking an active part in the hostilities constitute grave breaches of international humanitarian law, and that all countries are under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and to bring such persons, regardless of their nationality, before their own courts;<sup>26</sup> (emphasis added)

A considerably longer list of war crimes (applicable without distinction in both international and non-international armed conflict) is contained in Article 8 of the Statute of the ICC. Strictly speaking the purpose of that provision is merely to designate the war crimes which are within the jurisdiction of the ICC. It is fair to assume, however, that this provision will also be regarded as an authoritative pronouncement on the violations of the law of war that qualify as war crimes under customary international law.<sup>27</sup> A corollary then is that these offences are covered by the principle of universal jurisdiction.<sup>28</sup>

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<sup>23</sup> Article 4 ICTR Statute, reproduced at 33 ILM (1994) 1598.

<sup>24</sup> Prosecutor v. Dusko Tadic, Appeals Chamber of the ICTY, 2 October 1995, para. 137, 35 ILM (1996) 32. See Christa Meindersma, 'Violations of Common Article 3 of the Geneva Conventions as Violations of the Laws or Customs of War under Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia', 42 NILR (1995) 375.

<sup>25</sup> Art. 8(2)(c) and (e) ICC Statute.

<sup>26</sup> UN Commission on Human Rights Resolution 1999/1, 6 April 1999.

<sup>27</sup> Meron, *supra* note 22.

<sup>28</sup> See Yoram Dinstein, 'The Universality Principle and War Crimes', in M.N. Schmitt and L.C. Green (eds), *The Law of Armed Conflict: Into the Next Millennium* (1998) 17, 21.

### *Torture*

Under the UN Convention against Torture, a state party is required to submit the case of an alleged torturer found in its territory to its competent authorities for the purpose of prosecution, if it does not extradite him:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.<sup>29</sup>

The obligation is limited to persons found in a state's territory and therefore does not go as far as the Geneva Conventions which contain a duty to search for persons even when they are outside the territories of states parties. A prosecutor must treat offences in the same manner as if they had been committed in the prosecutor's own state.<sup>30</sup> Since the prosecutor is acting as an agent on behalf of the international legal order the fact that the crime may have been committed far away from the prosecutor's office has no bearing on his or her discretionary powers.

States not parties to the Convention against Torture are entitled, but not obliged, to exercise universal jurisdiction in respect of torture on the basis of customary international law.<sup>31</sup> The ICTY has pointed out that the entitlement of every state to investigate, prosecute, and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction is one of the consequences of the *jus cogens* character bestowed by the international community on the prohibition of torture.<sup>32</sup> Perpetrators of torture committed in states that are not parties to the Convention against Torture may therefore be brought to trial elsewhere on the basis of universal jurisdiction. Examples are the proceedings started recently in the United Kingdom and France against a Sudanese and a Mauritanian national for torture committed in Sudan and Mauritania, respectively.<sup>33</sup> Sudan and Mauritania are not parties to the Convention against Torture.

### *Other crimes*

By its very nature, the principle of universal jurisdiction can apply only in a limited number of instances.<sup>34</sup> For the time being, it may be wiser to concentrate on the need to exercise the principle with regard to the crimes to which it clearly applies under current international law rather than to focus on an expanded catalogue of crimes. Nevertheless, the number of offences that are

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<sup>29</sup> Article 7(1).

<sup>30</sup> Art. 7(2).

<sup>31</sup> Rodley, *supra* note 16, 129-130.

<sup>32</sup> Prosecutor v. Anton Furundzija, ICTY, 10 December 1998, para. 156, 38 ILM (1999) 346.

<sup>33</sup> See Appendix.

<sup>34</sup> F.A. Mann, 'The Definition of Jurisdiction', 111 *Receuil des cours* (1964) 95.

subject to universal jurisdiction in international law is likely to continue to increase. For example, perpetrating 'forced disappearances' (on a scale not amounting to a crime against humanity) has recently been identified as a crime subject to universal jurisdiction under the Inter-American Convention on Forced Disappearance of Persons.<sup>35</sup> This regional initiative has been endorsed at the global level. The UN Declaration on the Protection of all Persons from Enforced Disappearances contains a provision on the exercise of universal jurisdiction with regard to persons presumed responsible for an act of enforced disappearance.<sup>36</sup>

### **Relationship between universal jurisdiction and international criminal tribunals**

As was pointed out in the Committee's First Report, the principal motivating force behind the increased willingness of states to try perpetrators of war crimes and crimes against humanity on the basis of universal jurisdiction has been the establishment of the ICTY and ICTR. More and more states have adopted implementing legislation and policies enabling them to bring persons to trial on the basis of universal jurisdiction as a direct result of Security Council decisions under Chapter VII of the UN Charter. Furthermore, the example set by the ICTY and ICTR in bringing perpetrators to trial is likely to have inspired and given courage to prosecutorial activities at the domestic level.

This beneficial effect on the exercise of universal jurisdiction was achieved in spite of the fact that both Tribunals enjoy primacy over domestic courts. This means that '(a) any state of the procedure, the International Tribunal may formally request national courts to defer to the competences of the International Tribunal'.<sup>37</sup> In practice, few courts seem to have refused to accept that they were under a duty to defer to the competence of the ICTY. Deferral has frequently occurred from courts outside the former Yugoslavia and Rwanda, i.e. from courts exercising universal jurisdiction. All convictions based on universal jurisdiction referred to in the Appendix were only pronounced after the ICTY or the ICTR had declined to exercise their priority rights.

The establishment of the International Criminal Court (ICC) is likely to have a similarly positive effect. Unlike domestic courts the ICC will not have universal jurisdiction itself. If a situation is not referred to it by the Security Council, the ICC will only be able to exercise jurisdiction if the crime occurred in a state which is a party to the Statute or if the crime was committed by a person who is a national of a party to the Statute.<sup>38</sup> The ICC will therefore only be

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<sup>35</sup> Art. 4, Inter-American Convention on Forced Disappearance of Persons, 9 June 1994.

<sup>36</sup> Art. 14, UN Declaration on the Protection of all Persons from Enforced Disappearance, UNGA Res. 47/133, 18 December 1992.

<sup>37</sup> Art. 9(2) ICTY Statute and Art. 8(2) ICTR Statute. See Bartram S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals', 23 *Yale Journal of International Law* (1998) 383-436.

<sup>38</sup> Art. 12(2) ICC Statute.

able to exercise jurisdiction on the basis of the territoriality principle and the active personality principle. This is likely to leave a large gap that can only be filled through the exercise of universal jurisdiction by domestic courts.

Accordingly, the ICC Statute emphasizes the importance of domestic prosecutions. Its preamble recalls 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. This may be read as an implicit reference to prosecutions carried out outside the territorial state. Both the preamble and Article 1 of the ICC Statute provide that the Court shall be complementary to national criminal jurisdictions. Unlike the ICTY and the ICTR the ICC therefore will not enjoy primacy over domestic courts. It will only be able to exercise jurisdiction after it has determined that the state which has jurisdiction over the crime is unwilling or unable genuinely to carry out the investigation or prosecution.<sup>39</sup> The 'State which has jurisdiction' includes states other than the state where the crime was committed, i.e. *inter alia* states exercising jurisdiction on the basis of the universality principle. The pressure that will be generated by the ICC when it is considering whether in a given situation a state has been unwilling or unable to carry out a genuine investigation or prosecution might presumably spur the authorities of these states into action.

### **Obstacles to the exercise of universal jurisdiction**

A comparative analysis of the cases documented in the Appendix reveals several obstacles of a legal or practical nature that may prevent successful proceedings based on universal jurisdiction. Some of these difficulties may arise in any trial of crimes under international law. They include problems such as those relating to statutes of limitations, command responsibility, superior orders, and gender issues. A recent codification of the applicable rules of international law on these questions may be found in the Statute of the ICC. Some difficulties are, however, typical for the trial of crimes on the basis of universal jurisdiction and they will be considered here in some more detail. They include the failure to adequately incorporate international crimes, lack of specialised machinery, immunities, amnesties, evidentiary problems, and ineffective international supervision.

#### *Failure to incorporate crimes under international law*

In the *Lotus* case the Permanent Court of International Justice observed that the territoriality of criminal law is not an absolute principle of international law. The Court pointed out that every state remained free to adopt the principles for the exercise of criminal and civil jurisdiction which it regarded as most suitable, as long as long as it did not overstep the limits which international law placed upon its jurisdiction.<sup>40</sup> In practice, however, states have tended to be more

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<sup>39</sup> Art. 17(1) ICC Statute.

<sup>40</sup> The case of the *S.S. Lotus* (France v. Turkey), Permanent Court of International Justice, 7 September 1927, Series A No. 10.

restrictive and this has certainly been the case with regard to the exercise of criminal jurisdiction on the basis of universality. States have been reluctant to provide for such jurisdiction in the absence of a specific permission in international law. Moreover, domestic courts have shown themselves unwilling to try defendants on the basis of universal jurisdiction in the absence of unambiguous provisions in domestic legislation allowing them to do so. This is not only because courts are reluctant to meddle in the internal affairs of another state but also because they do not want to come into conflict with the maxim *nulla poena sine lege*.

States are of course free to choose the manner in which they wish to give effect to their international obligations. This enables them to select the method of implementation that is most likely to be effective in their domestic context.<sup>41</sup> In practice two approaches may be distinguished. Under the first approach, domestic legislation provides in general terms that crimes are subject to universal jurisdiction when the state in question is under an international obligation to do so. Penal law provisions then simply refer to the conventions in question. Examples of such provisions may be found in Danish, German and Swiss laws. Under the second approach, domestic legislation itself defines in precise terms the offences which are subject to universal jurisdiction. An example of this method is the Geneva Conventions Act adopted by a large number of states belonging to the Commonwealth.

Which of these two methods is to be preferred is debatable. The first has the advantage of greater flexibility. New developments in international law can be applied immediately without requiring a change in legislation. Its disadvantage, however, is that domestic judicial authorities may be reluctant to apply international legal concepts with which they are not familiar and which are not clearly defined in domestic law. Accordingly, domestic courts have shown themselves reluctant to apply offences defined primarily in customary international law, such as crimes against humanity.<sup>42</sup> The second approach does not have this drawback. It offers domestic authorities a legal framework with which they are familiar and on the basis of which they can act. The disadvantage of this method, however, is its rigidity.

In view of these differing legislative methods, it is not surprising that attempts to design model implementing legislation in the field of international humanitarian law have so far not been successful. Efforts to draft such legislation in fora such as the International Congress of Penal Law and the International Committee of the Red Cross, have failed to achieve the necessary support from states.<sup>43</sup> No attempt will therefore be made to present such model legislation in the context of the present report.

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<sup>41</sup> See Michael Bothe, 'Conclusions of the Chairman', in Michael Bothe (ed.), *National Implementation of International Humanitarian Law* (1990) 265.

<sup>42</sup> But see the order by the investigating magistrate in Brussels, *supra* note 17.

<sup>43</sup> J.S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary II* (1952) 264, note 2. Similarly, Bothe, *supra* note 22.

Until recently, only a few dozen states had provided their courts with the specific competence to try certain gross human rights offences under the principle of universal jurisdiction. Even in those states legislation tended to be quite a patchwork. Frequently, for example, laws implementing the Genocide Convention do not provide for the possibility to exercise jurisdiction on the basis of universal jurisdiction. This is because the Genocide Convention does not specifically require states parties to do so. Similarly, the absence of treaty provisions on the exercise of universal jurisdiction regarding crimes against humanity and crimes committed in non-international armed conflict explains why only few states have legal provisions allowing them to exercise universal jurisdiction with regard to these offences.

A curious phenomenon is that a number of states have limited their implementing legislation providing for the exercise of universal jurisdiction, *ratione loci* and *ratione temporis*, to offences committed in certain places and during certain periods only. One recent example of such selectivity is the law enacted in the United Kingdom in 1991, rather misleadingly called the War Crimes Act, under which criminal proceedings may only be brought against UK citizens or residents who committed certain war crimes in Germany or German-occupied territory during the Second World War.<sup>44</sup> The law is unlikely to cover more than a handful of cases.<sup>45</sup> Another example is France which has adopted legislation permitting its courts to exercise universal jurisdiction in respect of crimes against humanity and genocide, but only *vis-à-vis* crimes committed in the recent conflicts in the former Yugoslavia and Rwanda.

Because of this lack of proper incorporation of international crimes, domestic courts frequently refuse to exercise universal jurisdiction in respect of crimes against humanity, genocide or violations committed in internal armed conflict on the grounds that domestic legislation does not provide them with a sufficient legal basis. Australian, French and Swiss courts, amongst others, have taken this view.<sup>46</sup>

Ratification of the ICC Statute should accordingly provide states with a suitable occasion to review their legislation and ensure that their courts are able to exercise universal jurisdiction in respect of all offences defined in the Statute.

### *Lack of specialised institutions*

Investigating and prosecuting crimes on the basis of universal jurisdiction requires special skills, both in terms of knowing how to investigate crimes committed abroad and in terms of the specialised knowledge of international criminal law that is required. It therefore makes sense to establish specialised machinery for this purpose, as an expression of the political will to combat gross human rights offences wherever they occur. The staff of such an office may not only be charged with investigating international crimes but also with

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<sup>44</sup> Section 1, War Crimes Act 1991. Australia has a similar law.

<sup>45</sup> A.T. Richardson, 'War Crimes Act 1991', 55 *Modern Law Review* (1992) 73, 74.

<sup>46</sup> See Appendix.

liaising with the international criminal tribunals. It is true that sizeable war crimes units set up in Australia, Canada and the United Kingdom have not been very successful at prosecuting Second World War cases. However, this lack of success could be blamed largely on the difficulties inherent in investigating crimes that occurred 50 or more years ago. It does not provide an argument against the usefulness of specialised institutions.

### *Immunities*

Because human rights offences tend by definition to be committed by persons acting on behalf or with the consent or acquiescence of the state, a question which is likely to arise in proceedings on the basis of universal jurisdiction is whether a person accused of such offences is exempt from criminal responsibility because (s)he has acted in an official capacity. As a matter of fact, the point that official status does not constitute a defence in criminal proceedings in respect of crimes under international law has been specifically provided for in the Nuremberg Charter<sup>47</sup> and the Statutes of the ICTY<sup>48</sup> and the ICTR.<sup>49</sup> In 1998, the Rome Conference on the Statute of the ICC adopted the following provision:

... official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.<sup>50</sup>

Strictly speaking, of course, this provision merely applies to proceedings before the ICC. However, the ICTY has observed, with regard to torture, that the provision is 'indisputably declaratory of customary international law'.<sup>51</sup> The rule therefore apparently also applies in proceedings before domestic courts. In *Ex parte Pinochet* the British House of Lords determined in an important judgment that under UK law a former head of state does not enjoy immunity in respect of the crime of torture.<sup>52</sup> The ICTY had earlier gone further by concluding that even an existing head of state could not claim such immunity.<sup>53</sup> Although these findings were limited to the crime of torture, it could be

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<sup>47</sup> Art. 7 Nuremberg Charter.

<sup>48</sup> Art. 7 Statute ICTY.

<sup>49</sup> Art. 6 Statute ICTR.

<sup>50</sup> Art. 27(1) Statute ICC.

<sup>51</sup> *Furundzija* judgment, supra note 32, para. 140.

<sup>52</sup> UK House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 24 March 1999, 38 ILM (1999) 581. Case note by Christine M. Chinkin, 93 AJIL (1999) 703.

<sup>53</sup> *Furundzija* judgment, supra note 32, para. 140. Under the UK's State Immunity Act an existing head of state enjoys absolute immunity from prosecution. The Committee against Torture has requested the UK to amend this act to bring it into line with the Convention against Torture. UN Doc. CAT/C/SR.36 para. 11.

assumed that the same principle applies to other crimes subject to universal jurisdiction. In fact, it would appear that the notion of immunity from criminal liability for crimes under international law perpetrated in an official capacity, whether by existing or former office holders, is fundamentally incompatible with the proposition that gross human rights offences are subject to universal jurisdiction.<sup>54</sup> Accordingly, a recent Belgian law explicitly provides that the immunity attributed to the official capacity of a person does not prevent criminal responsibility for genocide, crimes against humanity and war crimes.<sup>55</sup>

### *Amnesties*

An issue on which there is no case law yet but which is likely to arise sooner or later, is whether domestic courts in a third state are bound by amnesties awarded in the territorial state.

It has been argued that awarding amnesties to perpetrators of gross human rights offences is in itself prohibited under international law.<sup>56</sup> If this proposition is correct, such amnesties are null and void and they cannot prevent proceedings in another state. International practice offers considerable, but not yet entirely conclusive, support for this line of argument. The Human Rights Committee has in one of its general comments taken the view that amnesties in respect of acts of torture are 'generally incompatible with the duty of states to investigate such acts'.<sup>57</sup> The UN General Assembly has declared that perpetrators of enforced disappearances shall not benefit from amnesties.<sup>58</sup> The Inter-American Commission on Human Rights has ruled that amnesty laws adopted in Argentina and Uruguay, which prevented the prosecution of crimes such as political killings, torture and forced disappearances, were incompatible with the right to judicial recourse.<sup>59</sup> In the terms of Article 17 of the ICC Statute such

<sup>54</sup> See Andrea Bianchi, 'Immunity versus Human Rights: The Pinochet Case', 10 EJIL (1999) 237, 276-277.

<sup>55</sup> Art. 5(3), Loi relative à la répression des infractions graves de droit international humanitaire, 10 February 1999, *Moniteur Belge*, 23 March 1999. English translation in 38 ILM (1999) 918.

<sup>56</sup> Naomi Roht-Arriaza, 'State Responsibility to Investigate And Prosecute Grave Human Rights Violations in International Law', 78 *California Law Review* (1990) 451, 485; Kai Ambos, 'Impunity and International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina', 18 HRLJ (1997) 1, 7. Louis Joinet, in his capacity as Special Rapporteur on amnesty laws of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, has been more ambivalent. UN Doc. E/CN.4/Sub.2/1985/16 para. 51 and 62.

<sup>57</sup> General comment No. 20 on Article 7.

<sup>58</sup> Art. 18, UNGA Declaration 47/133 on the Protection of All Persons from Enforced Disappearances, 8 December 1992.

<sup>59</sup> Reports No. 28/92 and 29/92, 2 October 1992, *Annual Report of the Inter-American Commission on Human Rights* 1992-1993, 41 and 154. See Robert Kogod Goldman, 'Amnesty Laws and International Law: A Specific Case', in International Commission of Jurists, *Impunity of Gross Human Rights Violations* (1992) 209. However, the Inter-American Commission and Court have been reluctant to declare illegal all amnesties for perpetrators of human rights abuses. Ellen Lutz, 'Responses to Amnesties by the Inter-American System for the Protection of Human Rights', in David Harris and Stephen Livingstone (eds), *The Inter-American System of Human Rights* (1998) 345, 368.

amnesties could be an indication of ‘unwillingness or inability of the State genuinely to prosecute’; they would therefore not prevent the ICC from declaring a case admissible. On 8 July 1999, the UN Secretary-General announced that he would sign the Sierra Leone Peace Agreement (which provides in Article 9 for a sweeping ‘absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives’), but subject to the proviso that ‘the amnesty and pardon shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law’.<sup>60</sup>

On the other hand, not all international practice on this matter points in the same direction. The United Nations itself has been far from consistent in its attitude to amnesties for perpetrators of gross human rights offenders.<sup>61</sup> Perhaps more significantly, South Africa’s Constitutional Court has held in *AZAPO v South Africa* that the country’s truth and reconciliation process is not incompatible with international law and this ruling has found some support in the literature.<sup>62</sup> Not all arguments supporting the admissibility of amnesties for crimes under international law are convincing, however. Reliance is sometimes placed on Article 6(5) of Protocol II to the Geneva Conventions which provides:

At the end of the hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons relating to the armed conflict, whether they are interned or detained.

As the International Committee of the Red Cross has pointed out, this provision merely states that combatants should not be punished for legitimate acts of hostility. It does not provide a legal basis for awarding amnesties to persons who have violated international law.<sup>63</sup>

But even if at least some types of amnesties are not incompatible with international law, it would appear that in any case they lack extra-territorial effect. They do not affect treaty obligations or entitlements under customary international law to bring gross human rights offenders to justice wherever they are.<sup>64</sup>

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<sup>60</sup> UN Daily Press Briefing, 5-7 July 1999.

<sup>61</sup> Michael Scharf, ‘Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?’, 31 *Texas International Law Journal* (1996) 1-41.

<sup>62</sup> Dugard has criticized the judgment for paying insufficient attention to international law considerations. But he accepts that ‘state practice is too unsettled to support a rule obliging states to prosecute those alleged to have committed crimes against humanity under all circumstances and that the present state of international law does not bar the granting of amnesty in circumstances of the kind prevailing in South Africa’. John Dugard, ‘Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question’, 13 *South African Journal on Human Rights* (1997) 258, 267. See also, Dugard, ‘Dealing with Crimes of the Past. Is Amnesty Still an Option?’, forthcoming in 12 *Leiden Journal of International Law* (2000).

<sup>63</sup> Letter from ICRC, quoted in Naomi Roht-Arriaza and Lauren Gibson, ‘The Developing Jurisprudence on Amnesty’, 20 *HRQ* (1998) 843, 865.

<sup>64</sup> See, with regard to torture, the Furundzija judgment, *supra* note 32, para. 155-156.

This applies most clearly to blanket amnesties that are obviously self-serving, such as the one Augusto Pinochet awarded himself and his colleagues before stepping down from office. Significantly, the lawyers acting for Pinochet chose not even to rely on this measure in the proceedings before the British courts. The same reasoning applies, however, to more palatable types of amnesties, such as the ones awarded by South Africa's Truth and Reconciliation Commission. In practice, this should cause no major difficulties. A bona fide amnesty could be taken into account by a prosecutor when exercising his or her discretion whether or not to bring a prosecution (assuming there is no duty to prosecute under the Geneva Conventions or the UN Convention against Torture). Similarly, when imposing a sentence a court could legitimately take into account as a mitigating factor the fact that the defendant had benefitted from a respectable amnesty decision in the territorial state.

Finally, it would not be contrary to Article 4(7) of the International Covenant on Civil and Political Rights to bring a defendant who has benefitted from an amnesty in the territorial state to justice in another state on the basis of universal jurisdiction. Procedures for awarding amnesties do not amount to 'acquittal' within the meaning of Article 14(7). The prohibition against *ne bis in idem* contained in that provision therefore does not apply. Even if it were assumed that the procedures of some truth and reconciliation commissions are sufficiently judicial in character to meet this standard, the Human Rights Committee has held that Article 14(7) does not prohibit trial for the same offence in another state.<sup>65</sup>

### *Evidentiary problems*

The greatest difficulty in bringing proceedings on the basis of universal jurisdiction may not be of a legal but of a practical nature. How does one obtain the necessary evidence to enable a defendant's conviction for offences committed abroad? The authorities of the territorial state can be expected to be reluctant to render assistance, even when they are obliged to do so, for the simple reason that they may bear co-responsibility for the offences. Even with the backing of the Security Council, the ICTY and the ICTR have found it difficult to obtain the necessary co-operation from the authorities of the states in which the offences were committed. Another problem is that witnesses often have to be traced in distant states. Even when they can be found they may be reluctant to testify for fear of reprisals against themselves or their families. Furthermore, numerous documents will need to be translated. As a result of these difficulties, investigations on the basis of universal jurisdiction tend to be much more expensive and time-consuming than investigations on the basis of the territoriality principle.

In recognition of these problems, the UN Declaration on the Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity specifically pro-

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<sup>65</sup> A.P. v. Italy, Comm. No. 204/1986, UN Doc. A/43/40, p. 242.

vides that states shall co-operate with each other in the collection of information and evidence which would help to bring to trial persons indicted for war crimes and crimes against humanity.<sup>66</sup> Some of the treaties providing for the exercise of universal jurisdiction similarly oblige the parties to render each other mutual legal assistance in the investigation and prosecution of these crimes.<sup>67</sup> These provisions obviously supplement any existing bilateral and multilateral treaty obligations to render mutual legal assistance in criminal matters that may be in force between the states in question. A useful checklist of the types of assistance that may be required may be found in the Statute of the ICC. They include assistance with the identification and locating the whereabouts of persons or the location of items, the taking of evidence, the serving of documents, the examination of places or sites, the execution of searches and seizures, the provision of records and documents, and the protection of victims and witnesses.<sup>68</sup>

The extent to which states have complied with requests for foreign assistance in the investigation and prosecution of human rights offences subject to universal jurisdiction is not known. Anecdotal evidence, however, would suggest that the situation is far from satisfactory. Mutual legal assistance in general is difficult enough. Delicate negotiations are often required to match the requirements of one jurisdiction with the practices of another.<sup>69</sup> In the large majority of cases listed in the Appendix of this report convictions appear to have been based essentially on eyewitness testimony that happened to be available in the prosecuting state without any significant assistance from the authorities of the territorial state. Any foreign legal assistance tended not to be obtained through official channels but only through personal contacts of the investigators.

Apart from relying on foreign assistance, there are several measures that may be taken unilaterally by states to facilitate the investigation and prosecution of gross human rights offences committed abroad. In particular, methods of gathering evidence abroad and of reducing reliance on oral testimony at trial may be usefully considered. A few examples indicate the range of possibilities. A Belgian investigating magistrate has conducted extensive rogatory missions to Rwanda, Togo and Ghana when investigating crimes committed in Rwanda.<sup>70</sup> A Swiss court has visited Rwanda to visit the site of the crime and to collect statements from witnesses unwilling or unable to come to Switzerland.<sup>71</sup> The ICTY has explored the use of written depositions for use at trial and the taking of evidence by video-link.<sup>72</sup> Serious consideration should also be given to the implementation of witness protection programs.

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<sup>66</sup> UNGA Res. 3074 (XXVIII) of 3 December 1973.

<sup>67</sup> Art. 88 Protocol I to the Geneva Conventions; Art. 9 UN Convention against Torture.

<sup>68</sup> Art. 93(1) ICC Statute. See also Art. 29 ICTY Statute and Art. 28 ICTR Statute.

<sup>69</sup> UK Home Office, Steering Committee Report, *Review of Extra-Territorial Jurisdiction*, July 1996, 25.

<sup>70</sup> See Appendix.

<sup>71</sup> See Appendix.

<sup>72</sup> See Rules 71 and 90, Rules of Procedure and Evidence ICTY

*Ineffective international supervision*

One of the reasons for the frequent failure of states to implement their international obligations with respect to universal jurisdiction both in law and in practice is the lack of systematic international supervision.

Of the international treaties that provide for the exercise of universal jurisdiction in respect of gross human rights offences only the UN Convention against Torture has its own supervisory body.<sup>73</sup> Unfortunately, the Committee against Torture has not paid more than perfunctory attention to compliance with the universal jurisdiction provisions of the Convention when reviewing implementation reports by states parties. While it has given regular attention to the need to adopt enabling legislation for this purpose, the Committee has shown little interest in the actual application of such legislation in individual cases.<sup>74</sup> Only after General Pinochet had been arrested in the United Kingdom in 1998, did the Committee adopt a forceful recommendation with respect to the actual exercise of universal jurisdiction in a specific case:

The Committee finally recommends that in the case of Senator Pinochet of Chile, the matter be referred to the office of the public prosecutor, with a view to examining the feasibility of and if appropriate initiating criminal proceedings in England, in the event that the decision is made not to extradite him. This would satisfy the State party's obligations under articles 4 to 7 of the Convention and article 27 of the Vienna Convention on the Law of Treaties 1969.<sup>75</sup>

It would be useful if the Committee were to undertake a more combative role on universal jurisdiction and if it were to adopt a 'general comment' providing that universal jurisdiction should not only be established in law but that it should also be exercised in practice and that states parties should extend each other mutual legal co-operation when investigating relevant cases.<sup>76</sup>

As was pointed out above, a considerable impetus towards implementation of the principle of universal jurisdiction has been provided by Security Council decisions supporting the establishment and the operation of the ICTY and

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<sup>73</sup> Although the Geneva Conventions lack a supervisory body, the International Committee of the Red Cross through its Advisory Service on International Humanitarian Law has done useful work in assisting states parties to adopt appropriate implementing legislation with regard to universal jurisdiction.

<sup>74</sup> In only two individual cases the Committee has asked states parties why they had not initiated an investigation in accordance with the Convention's universal jurisdiction provisions. See questions posed to the Netherlands, with regard to the visit by General Pinochet there in 1994 (the matter was first raised by the Netherlands itself, UN Doc. CAT/C/SR.210 para. 8 and 43) and to Colombia, with regard to the residence of General Avriil (UN Doc. CAT/C/SR.239 para. 45). Chris Ingelse, *De rol van het Comité in de ontwikkeling van het VN-Verdrag tegen Foltering* (1999) 292-295.

<sup>75</sup> UN Doc. CAT/C/SR.360 p. 5.

<sup>76</sup> Ingelse, *supra* note 74, 301.

ICTR. Through these decisions states have been urged to arrest and detain persons suspected of having committed crimes within the jurisdiction of the Yugoslavia and Rwanda Tribunals and to either hand them over to the relevant Tribunal or to bring them to justice themselves. For example, in Resolution 978 (1995) the Security Council:

Urge[d] states to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda *or by the appropriate national authorities*, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda (emphasis added).

In other cases, however, the Security Council has not specifically called for the exercise of universal jurisdiction in respect of gross human rights offenders. In Resolution 1264 (1999) on East Timor, for example, the Security Council merely demanded in general terms that those responsible for acts of violence in East Timor be brought to justice. It would therefore be useful if the Security Council would more frequently urge states to exercise universal jurisdiction in respect of gross human rights offences being committed in particular states, perhaps as an intermediary step before referring a situation to the ICC. It would also be useful if the Security Council, in the absence of relevant treaty monitoring procedures, were to undertake a monitoring role. In a recent report to the Security Council the Secretary-General made the felicitous suggestion that the Council undertake such a role both with regard to the adoption of domestic legislation and the initiation of prosecutions. He recommended that the Security Council:

Urge Member States to adopt national legislation for the prosecution of individuals responsible for genocide, crimes against humanity and war crimes. Member States should initiate prosecution of persons under their authority or on their territory for grave breaches of international humanitarian law on the basis of the principle of universal jurisdiction and report thereon to the Security Council.<sup>77</sup>

### **Safeguards against the abuse of universal jurisdiction**

From the point of view of the defendant, the exercise of universal jurisdiction presents some special difficulties that deserve to be taken quite seriously.

To begin with, the decision to initiate proceedings on the basis of universal jurisdiction may be objected to. States exercising jurisdiction on this basis may be accused of jurisdictional imperialism because universal jurisdiction is only

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<sup>77</sup> Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc. S/1999/57, 8 September 1999.

likely to be exercised in powerful states with regard to crimes committed in less powerful states. At first sight, the cases summarized in the Appendix would appear to support this accusation. Most cases of the exercise of universal jurisdiction have been in OECD states with respect to crimes committed outside these states.<sup>78</sup> On the other hand, international obligations to prosecute gross human rights offences on the basis of universal jurisdiction are relatively straightforward and are contained in treaties that have been widely ratified. It can hardly be held against states that they are prepared to comply with their international obligations, especially if they have initiated proceedings for similar offences against their own nationals. In none of the cases referred to in the Appendix has there been any indication that prosecutions were carried out on political or frivolous grounds. Only in the Pinochet case did the authorities of the territorial state raise (rather unconvincing) objections of principle.

There are, nevertheless, inherent risks to the fairness of proceedings far removed from the site of the crime and against a defendant who may not understand the language and the culture in which (s)he is being brought to justice. It should therefore be stressed that like any defendant in criminal proceedings, the defendant being tried on the basis of universal jurisdiction is fully entitled to fair treatment in accordance with applicable international human rights standards. All semblance of unfair treatment should be avoided. To underscore the point, treaties providing for universal jurisdiction tend to contain specific safeguards guaranteeing the right to a fair trial of persons being brought to justice on this basis.<sup>79</sup> Particular attention ought to be paid to the defendant's right to interpretation and translation, his right to effective legal representation, his right to consular assistance under the Vienna Convention on Consular Relations and his right to call and examine witnesses. Prosecuting authorities and courts should be sensitive to cultural differences and to gender issues, for example the reluctance of women from some cultures to testify about sexual violence to which they have been subjected because this might result in their rejection. Defendants should be tried by civilian courts. The policy of some states (notably the Netherlands and Switzerland) to let military courts try civilians accused of gross human rights offences raises questions about the fairness of such proceedings. The defendant must not be sentenced to death.<sup>80</sup>

### **Conclusions and recommendations**

1. Gross human rights offenders should be brought to justice in the state in which they committed their offences. In the absence of such proceedings, full advantage should be taken of the possibility to bring perpetrators to

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<sup>78</sup> But see the proceedings initiated in Senegal against former President Habré of Chad, referred to in the Appendix.

<sup>79</sup> See Articles 49, 50, 129 and 146 of the First, Second, Third and Fourth Geneva Conventions respectively (referring to the procedures set out in Article 105 ff of the Third Geneva Convention) and Article 8 of the UN Convention against Torture.

<sup>80</sup> Cf. Art. 77, ICC Statute and corresponding provisions in the ICTY and ICTR Statutes.

- trial on the basis of universal jurisdiction. The need to exercise such jurisdiction is not obviated by the existence of international criminal tribunals.
2. Gross human rights offences in respect of which states are *entitled* under customary international law to exercise universal jurisdiction include genocide, crimes against humanity, war crimes (as defined in Articles 6-8 of the Statute of the ICC, respectively) and torture (as defined in Article 1 of the UN Convention against Torture). States parties to the Geneva Conventions and the UN Convention against Torture are *obliged* to exercise universal jurisdiction in respect of grave breaches and torture.
  3. Universal jurisdiction is unlikely to be exercised in practice without appropriate domestic legislation. States should therefore ensure that their laws enable their courts to exercise universal jurisdiction with regard to all the above offences. If such legislation refers in general terms to crimes under international law, it should be made clear that this includes customary international law. The scope of such legislation should be universal and not restricted to offences committed in certain armed conflicts only.
  4. No immunities in respect of gross human rights offences subject to universal jurisdiction shall apply on the grounds that crimes were perpetrated in an official capacity.
  5. The obligation or the entitlement of states to bring perpetrators of gross human rights offences to justice on the basis of universal jurisdiction is not affected by amnesties awarded in the territorial state. Individual amnesties awarded as part of a legitimate legal process may however be taken into account by a prosecutor when exercising his or her discretion whether or not a prosecution would be in the public interest (assuming there is no treaty obligation to prosecute) and by a court when imposing a sentence.
  6. The extent to which states comply with their international obligations to provide each other mutual legal assistance in the investigation and prosecution of gross human rights offences subject to universal jurisdiction should be carefully monitored.
  7. States should improve their capacity to investigate and prosecute gross human rights offences on the basis of universal jurisdiction by establishing specialised machinery for this purpose, by amending the law on criminal procedure, e.g. by widening the admissibility of written evidence (*procès-verbal*), by making arrangements for the conduct of rogatory missions abroad, by allowing courts to take evidence by video-link, and by establishing witness protection programs.
  8. The Committee against Torture, set up under the UN Convention against Torture, should consistently verify whether states parties have not only established universal jurisdiction in law but whether they also exercise it in practice and whether they actually co-operate with each other in investigating relevant cases.
  9. A defendant brought to justice on the basis of universal jurisdiction is enti-

tled to a scrupulously fair trial in accordance with all applicable international human rights standards. Specific attention should be paid to the defendant's right to interpretation and translation, right to consular assistance under the Vienna Convention on Consular Relations, right to adequate counsel and right to call and examine witnesses. Prosecutors, defence counsel and courts should be sensitive to cultural differences and gender issues. Because of the special requirements involved, human rights organizations monitoring the fairness of trials should pay special attention to trials conducted on the basis of universal jurisdiction. The defendant must not be sentenced to death.

## APPENDIX

The first large scale exercise of universal jurisdiction in respect of gross human rights offences occurred immediately following the Second World War. The International Military Tribunals at Nuremberg and Tokyo tried the Axis war criminals that were regarded as 'major'. War criminals that were not classified in this way were tried by British and United States military tribunals, sitting in Germany, Italy, the Netherlands and on Kwajalein Island. Often they tried offences committed against their own nationals but occasionally there was no such connection.<sup>81</sup> Classifying the latter cases as genuine examples of the exercise of universal jurisdiction is problematic because the tribunals usually failed to indicate an explicit legal basis for their assumption of jurisdiction. Most cases can in fact be justified on the basis of the passive personality principle, especially if it is assumed that this principle enables the assumption of jurisdiction with regard to crimes committed against persons of the same nationality as the judges sitting on these tribunals.<sup>82</sup>

Following this immediate post-war period, actual prosecutions based on universal jurisdiction have been extremely rare, even though the number of conventions providing for universal jurisdiction has continued to increase steadily. Universal jurisdiction was relied upon to bring *Adolf Eichmann* and *John Demjanjuk* to justice in Israel but this was merely one among several jurisdictional grounds. The Israeli Supreme Court which convicted Eichmann<sup>83</sup> and the US courts which decided to permit Demjanjuk's<sup>84</sup> extradition to Israel relied not

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<sup>81</sup> See the overview provided in Willard B. Cowles, 'Trials of War Criminals (Non-Nuremberg)', 42 AJIL (1948) 299-319.

<sup>82</sup> See A.R. Carnegie, 'Jurisdiction over Violations of the Laws and Customs of War', 39 BYIL (1963) 402, 422.

<sup>83</sup> Attorney-General v. Adolf Eichmann, Supreme Court of Israel, 29 May 1962, 36 ILR 5, 298-304. See J.E.S. Fawcett, 'The Eichmann Case', 38 BYIL (1962) 181, 202-208.

<sup>84</sup> See Rena Hozore Reiss, 'The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine', 20 *Cornell International Law Journal* (1987) 281, 302-307.

only on the universal jurisdiction principle but also on the protective principle and the passive personality principle. They thus recognised that there was a connection between the offences of which the two men were accused and the state bringing them to justice even though the State of Israel did not yet exist when the offences were committed. Not surprisingly, therefore, in 1986 the Legal Adviser of the International Committee of the Red Cross expressed the view that universal jurisdiction was 'of no practical value' for war crime trials.<sup>85</sup>

In recent years, however, a number of alleged perpetrators of atrocities committed in the former Yugoslavia and Rwanda have been successfully brought to trial in states other than the territorial state exclusively on the basis of universal jurisdiction. Proceedings were also started under the UN Convention against Torture in several states: in the United Kingdom in respect of offences committed in Sudan, in France in respect of offences committed in Mauritania and in Senegal in respect of offences committed in Chad. In all these cases, the only link between the offence and the prosecuting state was the presence of the alleged offender in its territory. This appendix summarizes a number of cases in which suspects have been brought to trial on the basis of universal jurisdiction during the 1990s.<sup>86</sup> It reflects information available to the Committee as of 1 April 2000.

#### *Australia*

The 1945 War Crimes Act, as amended in 1988, is so restrictive that it can hardly qualify as an example of a law enabling the exercise of universal jurisdiction. Its scope is limited to war crimes committed in Europe during the Second World War by Australian citizens or residents. The three prosecutions initiated under the amended law all failed to result in convictions. The War Crimes Special Investigations Unit with 50 staff was dissolved in 1992 and it is considered unlikely that any further prosecutions will be carried out under this law.<sup>87</sup>

With respect to crimes against humanity and genocide the position is even worse. On 1 September 1999, in *Nulyarimma v. Thompson* the Federal Court of Australia concluded that, in the absence of enabling legislation, no person may be tried for genocide before an Australian court.<sup>88</sup>

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<sup>85</sup> Yves Sandoz, 'Penal Aspects of International Humanitarian Law', in M. Cherif Bassiouni (ed.), *International Criminal Law* (1986) vol. I, 209, 230.

<sup>86</sup> For a detailed overview of relevant legislation and cases in Western Europe, see also the report by Fiona McKay for the Redress Trust, *Universal Jurisdiction in Europe: Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide* (1999). Available from Redress, 6 Queen Square, London WC1N 3A, United Kingdom and on [www.redress.org](http://www.redress.org).

<sup>87</sup> See Gillian Triggs, 'Australia's War Crimes Trials: All Pity Choked', in T.L.H. McCormack and G.J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997) 123-149.

<sup>88</sup> *Nulyarimma and others v. Thompson*, Federal Court of Australia, Full Court, 1 September 1999, 39 ILM (2000) 20.

### *Austria*

On 31 May 1995, *Dusko Cvjetkovic*, a Bosnian Serb seeking asylum in Austria, was acquitted by a district court in Salzburg of having committed genocide against Muslims in Bosnia. The case was apparently poorly prepared by the prosecution as none of its five witnesses managed to identify the defendant during the trial. Significantly, however, the Austrian Supreme Court had earlier agreed that Austrian courts had jurisdiction to try the case.<sup>89</sup>

### *Belgium*

Belgium probably has the most far-reaching and up-to-date legislation permitting the exercise of universal jurisdiction. Its 1993 law applies to war crimes committed both in international and non-international armed conflicts.<sup>90</sup> Jurisdiction may be exercised even when the suspect is not present on Belgian territory.<sup>91</sup> Moreover, the law has recently been amended to expand the range of crimes to which it applies. This 1999 amendment enables the courts to additionally exercise universal jurisdiction in respect of perpetrators of genocide and crimes against humanity, as defined in the Statute of the ICC.<sup>92</sup> No form of official immunity may be invoked to prevent the application of this law.

A *juge d'instruction* (investigating magistrate) based in Brussels has carried out extensive investigations, involving more than 20 suspects, of crimes committed during the civil war in Rwanda. Some of these individuals were suspected of having been involved in the killing of Belgian blue helmets in Rwanda and some were Belgians suspected of involvement in the Rwanda genocide. However, there were also some genuine universal jurisdiction cases in which there was no such link with Belgium.<sup>93</sup> As part of his investigations, the *juge d'instruction* carried out four rogatory missions, three to Rwanda, and one to Togo and Ghana.<sup>94</sup> However, for reasons which are unclear the Public

<sup>89</sup> See Axel Marschik, 'The Politics of Prosecution: European National Approaches to War Crimes', in Timothy L.H. McCormack and Gerry J. Simpson (eds), *The Law of War Crimes* (1997) 65, 79-81.

<sup>90</sup> Loi relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions, 16 June 1993, *Moniteur Belge*, 5 August 1993.

<sup>91</sup> A. Andries, E. David, C. van den Wijngaert, 'Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves aux droit international humanitaire', *Revue du droit pénal criminel* 1994, 1114, 1173.

<sup>92</sup> Loi relative à la répression des violations graves de droit international humanitaire, 10 februari 1999, *Moniteur Belge*, 23 March 1999. English translation in 38 ILM (1999) 918. Damien Vandermeersch, a *juge d'instruction* based in Brussels had determined several months earlier, in proceedings against general Pinochet, that crimes against humanity could be investigated in Belgium, in accordance with the principle of universal jurisdiction, on the basis of customary international law. *Juge d'instruction à Bruxelles*, 6 November 1998, *Revue de Droit Pénal et de Criminologie* 1999, 278-300. Case note by Luc Reydamas, 93 AJIL (1999) 700.

<sup>93</sup> L. Reydamas, 'Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice', 4 *European Journal of Crime, Criminal Law and Criminal Justice* (1996) 18-47, 37.

<sup>94</sup> Damien Vandermeersch, 'La répression en droit belge des crimes de droit international', 68 *International Review of Penal Law* (1997) 1093, 1121-1122.

Prosecutor has so far failed to initiate any prosecutions on the basis of the evidence gathered by the *juge d'instruction*. The Belgian legislation has therefore been qualified as a paper tiger by some observers.<sup>95</sup>

### *Canada*

Canada is comparatively well equipped to respond to gross human rights offences. Second World War cases are handled by the Department of Justice War Crimes Section, which includes eight lawyers and five historical staff.<sup>96</sup> More recent cases are handled by the Modern War Crimes Unit at the Department of Citizenship and Immigration, which has 10 staff.<sup>97</sup> In spite of this significant allocation of resources, so far no one has been convicted in Canada on the basis of universal jurisdiction for gross human rights offences committed abroad. One reason for this is that in 1994 in the *Imre Finta* case the Supreme Court of Canada laid down such high standards of proof for the conviction of perpetrators of war crimes and crimes against humanity that prosecutions became an unrealistic option.<sup>98</sup> The Government's declared policy now is to remove suspected perpetrators of gross human rights offences from Canada rather than to bring them to justice.<sup>99</sup> This Not In My Backyard policy would appear to be incompatible with Canada's obligations under the Geneva Conventions and the Convention against Torture.

### *Denmark*

On 25 November 1994, *Refik Saric*, a Bosnian Serb seeking asylum in Denmark, was sentenced to eight years imprisonment for having murdered and tortured inmates of a concentration camp in Bosnia.<sup>100</sup> The conviction was confirmed on appeal.<sup>101</sup> The Danish courts based their jurisdiction on the grave breaches provisions in Articles 129 and 130 of the Third Geneva Convention and Articles 146 and 147 of the Fourth Geneva Convention in conjunction with Article 8(5) of the Danish Penal Code which provides them with jurisdiction to try perpetrators of certain crimes when Denmark is bound by a treaty to do so.<sup>102</sup> The investigation of the case was greatly facilitated by the fact that the

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<sup>95</sup> Luc Reydams, 'De Belgische wet ter bestraffing van inbreuken op het internationaal humanitair recht: een papieren tijger?', 7 *Zoeklicht* Nr. 20 (1998), 4-9.

<sup>96</sup> *Public Report: Canada's War Crimes Program 1998-1999*, 4.

<sup>97</sup> *Ibid.*, 6.

<sup>98</sup> *Regina v. Finta*, Supreme Court of Canada, 24 March 1994. Case note by Irwin Cotler, 90 *AJIL* (1996) 460.

<sup>99</sup> *Canada's War Crimes Program*, supra note 96, 14.

<sup>100</sup> *Prosecution v. Refik Saric*, Third Chamber of the Eastern Division of the Danish High Court, 25 November 1994. See Rafaëlle Maison, 'Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes', 6 *EJIL* (1995) 260.

<sup>101</sup> *Prosecution v. Refik Saric*, Supreme Court of Denmark, 15 August 1995, *Ugeskrift for Retsvaesen* 195, 838.

<sup>102</sup> See Marianne Holdgaard Bukh, 'Prosecution Before Danish Courts of Foreigners Suspected of Serious Violations of Human Rights or Humanitarian Law', 6 *European Review of Public Law* (1994) 339, 341.

defendant was recognized in the Danish refugee centre in which he stayed by 39 persons who testified that they had witnessed how the defendant ill-treated inmates of the concentration camp. The investigation was impeded, however, by the fact that in spite of repeated requests the prosecution received no legal assistance from the authorities in Bosnia and Croatia.<sup>103</sup>

### France

On 6 January 1998, the French *Cour de cassation* (Supreme Court) agreed that *Wenceslas Munyeshyaka*, a Rwandan priest residing in France accused of having committed genocide and crimes against humanity against Tutsi refugees in Rwanda, could be brought to justice in France on the basis of universal jurisdiction.<sup>104</sup> The court acknowledged that jurisdiction to try such crimes derived *inter alia* from a law by which France had given effect to Security Council Resolution 955.<sup>105</sup> No judgment on the merits has been adopted so far.

On 3 July 1999, *Ely Ould Dha*, a lieutenant in the Mauritanian army was arrested in Montpellier, on suspicion of having tortured detainees in a prison Mauritania in 1990 and 1991.<sup>106</sup> On 28 September 1999, he was released pending the investigation.

### Germany

Germany has so far been the most active in exercising universal jurisdiction in respect of gross human rights offences. This may partly be explained by the presence in its territory of large numbers of asylum seekers from the former Yugoslavia. Under Article 6(9) of the German Penal Code, German criminal law applies to acts that, because of an international treaty binding on Germany, must be prosecuted even in cases when such acts have been committed abroad. Under Article 6(1) of the same Code, German criminal law applies to the crime of genocide when committed abroad.<sup>107</sup>

On 23 May 1997, *Novislav Djajic* was found guilty of having been an accessory to 14 cases of murder and sentenced to five years imprisonment by a court in Munich. He was acquitted of having been an accessory to genocide.<sup>108</sup> This

<sup>103</sup> Erik Merlung, 'National Implementation: The Universal Jurisdiction. The Saric Case', in *The Punishment of War Crimes: International Legal Perspective*, report of a conference organized by the Belgian Red Cross and the Belgian Ministry of Foreign Affairs, 9 October 1996, 12, 13.

<sup>104</sup> In re *Wenceslas Munyeshyaka*, *Cour de Cassation*, Paris, 6 January 1998, 102 RGDIP (1998) 825. Case note by Brigitte Stern, 93 AJIL (1999) 525. See also Brigitte Stern, 'La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda', 40 GYIL (1997) 280-299.

<sup>105</sup> Law 96-432 of 22 May 1996.

<sup>106</sup> Press release, Fédération internationale des Ligues des droits de l'homme, 5 July 1999.

<sup>107</sup> See Herwig Roggeman, 'Strafverfolgung von Balkankriegsverbrechen aufgrund des Welterchtsprinzips - ein Ausweg?', 47 *Neue Juristische Wochenschrift* (1994) 1436; Dietrich Oehler, 'Verfolgung von Völkermord im Ausland', 10 *Neue Zeitschrift für Strafrecht* (1994) 485; Dorothee Füth, 'Die Verfolgung von Völkermord durch deutsche Gerichte aufgrund des Weltrechtspflegeprinzips', 10 *Humanitäres Völkerrecht* (1997) 38.

<sup>108</sup> *Prosecution v. Novislav Djajic*, Bayerisches Oberstes Landesgericht, 23 May 1997.

judgment is still under appeal, inter alia on the grounds of lack of jurisdiction of the German courts.

On 26 September 1997, *Nikola Jorgic*, a former leader of a Serb para-military group, was found guilty by a court in Düsseldorf on 11 counts of genocide and sentenced to life imprisonment. The evidence against him consisted of a television interview in which he confirmed his leadership role and a long series of eyewitness testimonies.<sup>109</sup> On 30 April 1999, the *Bundesgerichtshof* (Supreme Court) upheld the conviction and confirmed that German courts had jurisdiction on the basis of the Genocide Convention and because there were sufficient links with Germany, inter alia because the defendant had been residing in Germany for a long time.

On 29 November 1999, *Maksim Sokolovic* was sentenced to nine years imprisonment by the same Düsseldorf court for having inflicted severe ill-treatment on Muslims in Serbia.

On 15 December 1999, a fourth Bosnian Serb, *Djuradi Kusljic*, was convicted of genocide and sentenced to life imprisonment by the same Munich court that had convicted Novislav Djajic.

### *Netherlands*

On 11 November 1997, the *Hoge Raad* (Supreme Court) of the Netherlands ruled that *Darko Knezevic*, a Bosnian Serb residing in the Netherlands accused of various war crimes committed against Muslims in Bosnia-Herzegovina, could be tried by a Dutch military court on the basis of universal jurisdiction. The court found that jurisdiction of the Dutch courts was not limited to offences committed during wars in which the Netherlands had been a party.<sup>110</sup> This finally clarified an ambiguity in the Dutch War Crimes Act of 1952 that was inspired by the view taken by B.V.A. Röling, the Dutch judge on the Tokyo Tribunal. Röling had maintained that the Geneva Conventions recognize the principle of universal jurisdiction only between belligerent states.<sup>111</sup> The defendant has not been tried on the merits so far.

### *Senegal*

On 3 February 2000, the Dakar Regional Court indicted former Chadian President Hissene Habré on torture charges and placed him under house arrest. This appears to have been the first exercise of universal jurisdiction in respect of human rights offences in an African state.

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<sup>109</sup> Prosecution v. Nikola Jorgic, Oberlandesgericht Düsseldorf, 26 September 1997.

<sup>110</sup> Prosecution v. Darko Knezevic, Supreme Court of the Netherlands, 11 November 1997, NJ 1998, 463. English translation in 1 *Yearbook of International Humanitarian Law* (1998) 601-607. See on this case Richard van Elst, 'De zaak Darco Knezevic: rechtsmacht over Joegoslavische en andere buitenlandse oorlogsmisdadigers', 73 NJB (1998) 1587-1593.

<sup>111</sup> See B.V.A. Röling, 'The Law and the National Jurisdiction', *Recueil des cours* 1960-II, 359-362. See also the illuminating conversation between Cassese and Röling in B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond* (1993) 95-98.

### *Spain*

On 4 and 5 November 1998, the *Audiencia Nacional* (National Court) agreed that Spanish courts had jurisdiction to try alleged perpetrators of genocide and torture committed in Argentina and Chile. The court based its ruling on the principle of universal jurisdiction although it relied primarily on the passive personality principle because many of the victims were Spanish nationals.<sup>112</sup> The rulings cleared the way for the international arrest warrant for General Pinochet issued by Judge Garzón.

### *Switzerland*

On 18 April 1997, *Goran Grabez*, a Bosnian Serb seeking asylum in Switzerland, was acquitted by a military tribunal in Lausanne of having committed various serious crimes in concentration camps in Bosnia-Herzegovina. The tribunal considered that it had not been proven beyond a reasonable doubt that the defendant had been in the camps at the times alleged. Damages were awarded to the defendant. The tribunal agreed, however, that it would have had jurisdiction to try the case under Article 109 of the Swiss Military Code.<sup>113</sup>

On 30 April 1999, *Fulgence Niyonteze*, a Rwandan citizen seeking asylum in Switzerland, was sentenced to life imprisonment by the same military tribunal in Lausanne for murder, attempted murder, incitement to murder and war crimes committed in Rwanda in 1994. This was the first conviction in Europe of a Rwandan national in connection with the Rwandan genocide. The tribunal refused to consider charges of genocide and crimes against humanity on the grounds that these crimes are not recognized as being subject to universal jurisdiction under Swiss law.<sup>114</sup> Witnesses were flown from Rwanda to Lausanne to testify during the trial. Before the beginning of the trial the court also visited Rwanda to collect statements from witnesses unwilling or unable to come to Switzerland.

### *United Kingdom*

In September 1997, *Mohammed Ahmed Mahgoub*, a Sudanese medical doctor residing in Scotland, was arrested and charged under Section 134 of the 1988 Criminal Justice Act with having committed torture in a secret detention centre in Sudan.<sup>115</sup> Section 134 implements the UN Convention Against Torture. In May 1999, the charges against the suspect were dropped, apparently for lack of evidence.<sup>116</sup>

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<sup>112</sup> Spanish National Court, Criminal Division, Case 19/97, 4 November 1998 and Case 1/98, 5 November 1998. Case note by María del Carmen Márquez Carrasco and Joaquín Alcaide Fernández, 93 AJIL (1999) 690, 691.

<sup>113</sup> Prosecution v. Goran Grabez, Military Tribunal Lausanne, 18 April 1997. See the case note by Andreas R. Ziegler, 92 AJIL (1998) 78.

<sup>114</sup> Jugement en la cause Fulgence Niyonteze, Tribunal militaire de division 2, Lausanne, 30 April 1999.

<sup>115</sup> Sunday Times 21 September 1997, 12.

<sup>116</sup> Redress, press release, 27 May 1999.

On 1 April 1999, 78-year-old *Anthony Sawoniuk* was sentenced to life imprisonment at the Old Bailey in London for having murdered in 1942 two Jews in what is now Belarus. This was the first and so far only conviction under the War Crimes Act of 1991. Pursuant to this law, criminal proceedings may be brought against UK citizens or residents in the UK who committed certain war crimes in Germany or German-occupied territory during the Second World War. In spite of its grand title, the law therefore has a very limited scope, both *ratione loci* and *ratione temporis*. A special unit of the Metropolitan Police has been created to investigate relevant cases.

### *United States*

In the United States, the principle of universal jurisdiction in respect of gross human rights offences committed abroad, has been relied upon with considerable success in civil lawsuits, pursuant to the Alien Tort Claims Act and the Torture Victim Protection Act.<sup>117</sup> However, a legal basis for exercising universal jurisdiction in criminal cases exists only for the offence of torture and no prosecutions have been initiated under this provision so far.<sup>118</sup> The 1996 War Crimes Act grants jurisdiction over grave breaches of the Geneva Conventions but merely on the basis of the active and passive personality principle and not on the basis of universal jurisdiction.

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<sup>117</sup> For an overview, see Beth Stephens, 'Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts', 40 GYIL (1997) 117-140.

<sup>118</sup> US report to the UN Committee against Torture, 15 October 1999.